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MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-71

KENNETH W. WARREN,
Petitioner,

NEW ENGLAND BAPTIST HOSPITAL,
Co-defendant,

against

ELAINE ROSENTHAL, as Executrix of the Estate of MARTIN C. ROSENTHAL, deceased,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Applicable Statutes	2
Statement of the Case	3
Statement of Facts	4
REASONS FOR DENYING THE WRIT:	
I—The decisions of the Court of Appeals for the Second Circuit are based upon the law of New York governing choice-of-law determinations involving foreign limitations in wrongful death actions and are both reasonable and correct. Under these circumstances this Court will not review the decisions of the Court below	6
II—New York has a clear and legitimate interest in the application of its damage law in this case. Therefore, the decision of the Court of Appeals to strike the Massachusetts limitation and apply New York law was not unconstitutional	7
Conclusion	10

Cases Cited

PAGE

Estate of Spiegel v. *Commissioner*, 335 U.S. 701 (1948) .....

Home Insurance Co. v. *Dick*, 281 U.S. 397 (1930) ....

Kilberg v. *Northeast Airlines, Inc.*, 9 N.Y.2d 34 (1961) 8,

Klaxon Co. v. *Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941) .....

Miller v. *Miller*, 22 N.Y.2d (1968) .....

Pearson v. *Northeast Airlines, Inc.*, 309 F.2d 553 (*en banc*) (1962), *cert. denied*, 372 U.S. 912 (1963) .. 7,

Richards v. *United States*, 369 U.S. 1 (1962) 6,

Statutes Cited

28 U.S.C. 1254(1) .....

Constitution of the State of New York, Art. 1, § 16 2,8,

New York Estates, Powers and Trusts Law, § 5-4.3.. 2,

Massachusetts General Law, Ch. 229, § 2 (1959).. 3,

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Opinions Below

The opinion of the Court of Appeals for the Second Circuit affirming the decision of the United States District Court for the Southern District of New York, was rendered on February 13, 1973, and is reported at 475 F.2d 438.[1] Petitioner's motion for a re-hearing in said Court and a re-hearing *en banc* were denied on March 21, 1973. Pet. pp. 48-49. The opinion of the United States District Court for the Southern District of New York was officially reported at 342 F.Supp. 246 (1972).

[1] The opinion is set forth at pages 25-45 of the Petition herein. "Pet." refers to the Petition for Certiorari.

Jurisdiction

Petitioner attempts to invoke the jurisdiction of this Court under 28 U.S.C. 1254 (1).

Question Presented

Should this Court review the considered decisions of the Court of Appeals and the District Court, holding that under the choice-of-law rules of New York, which the courts were bound to apply, New York has the greatest interest in the amount of damages recoverable in a wrongful death action by the New York beneficiaries of a New York decedent? Stated another way, did the court below err in holding that, assuming the defendants are guilty of malpractice and caused the death of plaintiff's decedent, the decedent's New York beneficiaries are entitled to recover under New York laws the pecuniary loss they sustained by reason of his death, rather than be limited to a maximum of $50,000 under Massachusetts' wrongful death statute?

Applicable Statutes

New York

Constitution of the State of New York, Art. 1, § 16:

> "The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation."

Estates, Powers and Trusts Law, § 5-4.3:

> "The damages awarded to the plaintiff may be such sum as the jury . . . deems to be fair and just compensation for the pecuniary injuries resulting from the decedent's death to the persons for whose benefit the action is brought. . . ."

Massachusetts

Massachusetts General Laws, Ch. 229, § 2 (1959):

> "A person who (1) by his negligence causes the death of a person in the exercise of due care . . . shall be liable in damages in the sum of not less than five thousand nor more than fifty thousand dollars, to be assessed with reference to the degree of his culpability. . . ."

Statement of the Case

Petitioner, Kenneth W. Warren, brings this Petition for a Writ of Certiorari to review the judgments and opinions of the United States Court of Appeals for the Second Circuit. That court reviewed the cases which set forth New York's choice-of-law rules, the Constitution of the State of New York, and the governmental interests of both New York and Massachusetts, and in applying them to the facts of this case, affirmed the judgment of the District Court. The Court of Appeals held that the New York policy of fully compensating harm from wrongful death outweighed any interest Massachusetts had in the application of its limitation on damages for wrongful death and, therefore, struck Petitioner's affirmative defense based on said limitation.

The primary ground for review asserted by petitioner is his contention that the court below did not give due weight to the Massachusetts wrongful death statute and to Massachusetts' interest in its application to the instant action. Petitioner seeks the review of this Court based upon language contained in the dissent below to the effect that to apply the New York law of damages to this plaintiff, a New Yorker who brought an action to recover damages for her New York husband's death, based upon New York's governmental interest and public policy would violate petitioner's constitutional rights. Yet, petitioner has cited no

authority to this Court to support his position. On the contrary, the opinion of the Court of Appeals manifests the careful consideration given to petitioner's constitutional rights. The Court of Appeals made its determination that the Massachusetts limitation should not be applied based upon New York's choice-of-law principles, and the very strong New York policy against wrongful death limitations.

Statement of Facts

Respondent is the widow and Executrix of the estate of Dr. Martin C. Rosenthal, deceased. She brings this action to recover damages for the death of her husband who died on March 27, 1969, following surgery performed at the New England Baptist Hospital, Boston, Massachusetts. The instant wrongful death and survival claims are predicated upon the negligence of the defendant, New England Baptist Hospital, and petitioner, with respect to their examination, diagnosis, treatment, and care of the decedent.

At the time of decedent's death, respondent and her husband were residents and domiciliaries of New York. They had three minor children who resided with them in New York. Respondent and her children are still New York residents. Decedent's estate is being administered in New York by the Surrogate of Westchester County, who appointed plaintiff as Executrix of her husband's estate.

Petitioner is the surgeon-in-chief of the hospital as well as a trustee, a member of the planning committee, and an officer of the corporation; a world renowned physician and surgeon, treating patients from all over the world, including New York. So too, the hospital has substantial contact with New York, for as the Court of Appeals pointed out:

> "It is undisputed that although the hospital is a Massachusetts corporation, approximately one-third of its

patients in 1969 came from outside Massachusetts and approximately 8% of its patients in the same year were from New York. Indeed, the hospital claimed in its 1969 annual report that it was 'not a local or community hospital in the usual sense, because its patients came from literally everywhere'." 475 F.2d at 440, Pet. p. 27.

Jurisdiction of petitioner to the extent of his insurance coverage was obtained by attachment levied upon the St. Paul Fire and Marine Insurance Company, a Minnesota corporation doing business in New York. Neither Dr. Warren's insurance policy, nor the insurance policy of the hospital makes any reference to coverage limitations in a wrongful death case. Jurisdiction of the hospital was obtained by service upon another officer of the hospital while soliciting funds in New York City.

Petitioner asserted in his answer an affirmative defense based upon Massachusetts' arbitrary $50,000 limit on recoverable damages in wrongful death actions. (Massachusetts General Law, Ch. 229 § 2, 1959.) There is, of course, no arbitrary limit on damages for death under New York law; damages are measured by the pecuniary loss sustained by the decedent's beneficiaries. (New York EPTL § 5-4.3.)

Respondent successfully moved to strike said defense in the District Court on the ground that New York choice-of-law rules require the application of New York law with respect to the issue of the measure of damages, because New York has the greatest interest in the application of its damage law to a New York plaintiff who brings an action for the benefit of New York beneficiaries arising out of the death of a New Yorker. The District Court (342 F.Supp. 246) granted respondent's motion and struck the defense of the Massachusetts limit. The United States Court of Appeals for the Second Circuit (475 F.2d 438) affirmed.

REASONS FOR DENYING THE WRIT

I

The decisions of the Court of Appeals for the Second Circuit are based upon the law of New York governing choice-of-law determinations involving foreign limitations in wrongful death actions and are both reasonable and correct. Under these circumstances this Court will not review the decisions of the Court below.

The Court of Appeals correctly held that the determination of the applicability of Massachusetts' wrongful death statute was to be determined by an application of New York's choice-of-law rules. *Klaxon Co.* v. *Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941).

Respondent will not burden this Court with a lengthy substantiation of the reasonableness and correctness of the judgments and opinions of the Court of Appeals which are readily apparent. Even the dissent indicated that the majority followed the holding of every New York Court of Appeals decision on the subject in its refusal to apply a foreign wrongful death limitation in a New York action brought by a New Yorker for the benefit of New Yorkers arising out of the death of a New York resident in a foreign jurisdiction:

> "Appellee [respondent herein] has correctly noted that the New York courts have never honored a foreign damage limitation such as that at issue." 475 F. 2d at 447; Pet. at p. 42.

This court ordinarily accepts the determinations of Courts of Appeals on questions of state law. *Richards* v. *United States*, 369 U.S. 1 (1962). Where, as in the case at bar, the Court of Appeals' opinion is based on a reason-

able construction of state law, such opinion will not be disturbed. *Estate of Spiegel* v. *Commissioner,* 335 U.S. 701, 707-708, and cases cited therein (1948).

II

New York has a clear and legitimate interest in the application of its damage law in this case. Therefore, the decision of the Court of Appeals to strike the Massachusetts limitation and apply New York law was not unconstitutional.

A state with substantial ties to a transaction in dispute has a legitimate constitutional interest in the application of its own rules of law. See: *Home Insurance Co.* v. *Dick,* 281 U.S. 397 (1930). As this Court recently held in *Richards* v. *United States,* 369 U.S. 1, 15 (1962):

> "Where more than one State has sufficiently substantial contact with the activity in question, the forum State, by analysis of the interests possessed by the States involved, could constitutionally apply to the decision of the case the law of one or another state having such an interest in the multistate activity."

In *Pearson* v. *Northeast Airlines, Inc.,* 309 F.2d 553 (*en banc*) (1962), *cert. denied,* 372 U.S. 912 (1963), this Court declined to review a determination of the Second Circuit which struck an affirmative defense based on the Massachusetts wrongful death limitation where a New York plaintiff brought an action in New York arising out of the death of a New Yorker in Massachusetts.

Petitioner's argument that this Court should now grant certiorari because this case is constitutionally different from *Pearson* was squarely met by the Court of Appeals which stated:

> "We believe that in this case, like *Pearson* v. *Northeast Airlines, Inc.,* [citation omitted] New York has

> a significant interest—its domiciliary is the one who died and his next of kin are New York's charges—and the 'incident' in Massachusetts is not purely a 'local one,' . . . since the decedent was from out of state, and the defendant hospital is a national one in terms of its patients, its staff, its reputation and its efforts to obtain out-of-state contributions. In these circumstances, the refusal by New York to apply the Massachusetts death act's qualitative and quantitative limitations, even as it applies the remainder of the death act, is not so unreasonable as to violate the full faith and credit clause. [citations omitted] The fact that Massachusetts was the situs of the tort and the residence of the defendant would not be sufficient to require as a matter of full faith and credit that the limitations in the Massachusetts law control, in light of the very strong New York policy against wrongful death limitations in connection with its citizens and next of kin and in light of the interstate aspects of the transaction. *Pearson* established that the Massachusetts death statute could be constitutionally sued upon in New York absent its penal quality and its damage limitations. Given a legitimate forum state interest—as is here present—we see no *constitutional* difference between death on the *Pearson* airplane, death in a taxicab on the way from the airport and death on the operating table." 475 F.2d at 446-447. (Emphasis in Original.)

Pearson followed the New York Court of Appeals decision in *Kilberg* v. *Northeast Airlines, Inc.*, 9 N.Y.2d 34 (1961), a death action arising out of the *Pearson* crash in which the Court refused to apply the Massachusetts wrongful death limitation based upon New York's strong public policy against such limitations. The *Kilberg* court, noting that New York's public policy in that regard was long-standing (since 1894) and was set forth in Article I, § 16

of the New York Constitution, characterized wrongful death recovery limitations as "absurd and unjust" and emphasized the strong New York policy against such limitations, at least to its domiciliaries. The Court held:

> "The absurdity and injustice [of wrongful death limitations] have become increasingly apparent in the six decades that have followed [the adoption of the New York constitutional prohibition]. For our court to be limited by [the Massachusetts] damage ceiling (at least as to our own domiciliaries) is so completely contrary to our public policy that we should refuse to apply that part of the Massachusetts law . . ." 9 N.Y. 2d at 40.

In *Miller* v. *Miller*, 22 N.Y.2d 12 (1968), the Court applied the new choice-of-law test and struck the Maine wrongful death limitation in an action brought as a result of an automobile accident in Maine, holding:

> "The rule which has evolved clearly in our most recent decisions is that the law of the jurisdiction having the greatest interest in the litigation will be applied, and that the facts or contacts which contain significance in defining State interests are those which relate to the purpose of the particular law in conflict." 22 N.Y.2d at 15, 16.
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> • • •
>
> "It is obvious, merely in outlining the purpose of the New York prohibition against limitations on recovery [New York Constitution, Article I, § 16], that *this State is vitally concerned with the manner in which the wife and children of a New York decedent will be compensated as a result of the wrongful killing of their 'breadwinner'.*" 22 N.Y.2d at 18. (emphasis added)

The Court of Appeals in the instant action recognized the long-standing, clear New York public policy against

the application of wrongful death limitations to New York decedents, and accordingly held:

> ". . . it is our considered view that the New York Court of Appeals would view the Massachusetts limitation . . . as so 'absurd and unjust' that the New York policy of fully compensating the harm from wrongful death would outweigh any interest Massachusetts has in keeping down in this limited type of situation the size of verdicts (and in some cases, insurance premiums). If, as *Kilberg* pointed out, 'the absurdity and injustice [of wrongful death recovery limitations] have become increasingly apparent [since 1894] [citation omitted]' since *Kilberg* they have become even more so." 475 F.2d at 445.

New York has a legitimate and *constitutional* interest in the application of its law of damages to the case at bar.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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